No. 83-1886

In the Supreme Court of the United States

OCTOBER TERM, 1984

DAVID M. NEWMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

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Petitioner claims that he had the right to withdraw a guilty plea after it was entered, but before the court had formally accepted the plea agreement and determined the sentence.

1. In two separate indictments in the United States District Court for the District of Columbia, petitioner was charged with various drug-related offenses. In the first indictment, filed on February 18, 1983, he was charged (along with co-defendant Rene Contee) with conspiracy to possess piperidine, knowing that it would be used to manufacture phencyclidine (PCP), in violation of 21 U.S.C. 841(d)(2) and 846, and related offenses. In the second indictment, filed on March 18, 1983, petitioner was charged with possession of cocaine with intent to distribute it, possession of marijuana, and possession of an unregistered

firearm, in violation of 21 U.S.C. 841(a) and 844, and D.C. Code Ann. § 6-2311(a) (1981).

On July 18, 1983, pursuant to a written plea agreement, petitioner entered a plea of guilty to possession of cocaine with intent to distribute, in return for which the government agreed to dismiss the remaining charges against him. The agreement contained no agreed-upon sentence or sentence recommendation. See Fed. R. Crim. P. 11(e)(1)(A). The district court questioned petitioner in accordance with Rule 11 of the Federal Rules of Criminal Procedure, and then stated, "I will accept your plea of guilty and enter a judgment of guilty on the plea" (7/18/83 Tr. 11). The court then referred the case to a probation officer for consideration and recommendation of a sentence.

After entry of his plea, but before sentencing, petitioner obtained new counsel. On October 4, 1983, shortly before sentencing, petitioner moved to withdraw his guilty plea. He argued, inter alia, that the plea had been "conditional" because the plea agreement had not yet been accepted by the district court. The court denied petitioner's motion, and petitioner was sentenced to five years' imprisonment and three years' special parole, and was fined $25,000.

The court of appeals affirmed without opinion (Pet. App. A1-A2).

2. Petitioner contends (Pet. 6-7) that, when the district court does not accept or reject the plea agreement at the time a guilty plea is entered, the defendant retains the right to withdraw the plea at any time prior to the court's decision. He states that the court's action in "accepting the plea and not the plea agreement * * * render[s] the plea conditional" (*id.* at 7).[1] This claim is without merit.

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[1]We do not fully understand what petitioner means when he states that the plea was "conditional" (see Pet. 7). We agree that the plea was

As an initial matter, the legal argument raised by petitioner is not plainly presented on the facts of this case. His claim depends upon a distinction between acceptance of the *plea* and acceptance of the *plea agreement*. However, at the time the district court accepted petitioner's guilty plea, it stated, "I will accept your plea of guilty *and enter a judgment of guilty on the plea*" (7/18/83 Tr. 11 (emphasis added)). For a court to state that it will enter a judgment of guilty on a plea is, we submit, tantamount to accepting the agreement as well as the plea. The transcript also reveals (*id.* at 11-12) that the delay between entry of the plea on July 18, 1983, and entry of the judgment was attributable to the court's decision on *sentence* — a matter not covered by the plea. Indeed, a delay of three weeks was expressly requested by defense counsel for the purpose of referring the case to the Alexandria Institute for Alternative Sentences for review. Once a defendant has tendered a plea of guilty, and the plea agreement has been accepted by the district court, the defendant may not take advantage of a deferred decision on sentence in order to withdraw his plea.

Even assuming that the district court deferred decision on whether to accept or reject the plea agreement, petitioner had no right to withdraw his plea. The district court was clearly correct in holding that "the withdrawal of a plea is permitted of right only if the court rejects the [plea] agreement" (Pet. App. A3).

Rule 11(e)(2) of the Federal Rules of Criminal Procedure expressly envisions that the district court "may defer its decision as to the acceptance or rejection until after there has been an opportunity to consider the presentence

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subject to a condition subsequent — acceptance of the agreement by the district court. But we do not agree that the plea was purely tentative, *i.e.*, that petitioner was free to withdraw from the agreement for any reason at any time prior to its formal acceptance by the court.

report." The Rule goes on to provide that, if the court *rejects* the plea agreement, it must "afford the defendant the opportunity to then withdraw his plea" (Fed. R. Crim. P. 11(e)(4)). The Rule does not provide a right to withdraw a tendered plea for any other reason. Unless the court rejects the agreement, therefore, withdrawal would seem to be governed by Fed. R. Crim. P. 32(d), which permits a defendant to move for withdrawal of a guilty plea, in the discretion of the district court, upon a showing of "any fair and just reason."

Petitioner made a Rule 32(d) motion, which was denied by the district court. Petitioner does not now challenge that decision (Pet. 5 n.2). Petitioner therefore has no basis for his claim under the Federal Rules of Criminal Procedure. And since he neither cites nor relies upon the Constitution or any statute, we are unable to perceive a legal basis for his claim.

Our analysis is consistent with this Court's recent decision in *Mabry* v. *Johnson,* No. 83-328 (June 11, 1984). The Court there rejected the court of appeals' holding that, as a matter of due process, a plea bargain becomes binding on the government upon acceptance by the defendant. Instead, the Court held, "[i]t is the ensuing guilty plea that implicates the Constitution" (slip op. 3). If the bargain becomes binding on the parties at the time of entry of the guilty plea, as *Mabry* suggests, then after that point neither the defendant nor the government has, as a matter of right, the privilege to withdraw.

3. The decision below does not conflict with *United States* v. *Ocanas,* 628 F.2d 353 (5th Cir. 1980), cert. denied, 451 U.S. 984 (1981).[2] In *Ocanas,* a plea agreement provided

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[2] *United States* v. *Cruz,* 709 F.2d 111 (1st Cir. 1983), and *United States* v. *Sanchez,* 609 F.2d 761 (5th Cir. 1980), cited by petitioner (Pet. 7-8), are in full accord with the decision below. In each case, the district court was held to be without power to reject a plea agreement having

for dismissal of certain charges against the defendants. The defendants tendered their pleas, but the district court deferred decision on whether to accept the agreement. Before the district court formally rejected the plea agreement, the government obtained a superseding indictment inconsistent with the agreement (*id.* at 356).[3] The district court then dismissed the original indictment and scheduled trial on the superseding indictment (*ibid.*). In effect, the government was *permitted* to withdraw from the plea agreement. The conviction in *Ocanas* is thus perfectly consistent with the principle embodied in the Federal Rules of Criminal Procedure and applied in *Mabry*: prior to entry of a plea, both parties are free to withdraw at any time, but after a plea is entered, neither party may withdraw except at the discretion of the district court, or if the plea agreement is rejected by the court.[4]

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once unequivocally accepted it. Accord, *United States* v. *Blackwell*, 694 F.2d 1325, 1336-1337 (D.C. Cir. 1982). These decisions have no bearing on a defendant's right to withdraw a tendered plea before it is either accepted or rejected.

[3]Although the court of appeals did not mention the fact in its opinion, the government did not seek the superseding indictment until after the district court had advised the prosecutors informally that it would reject the proposed plea agreement. Memorandum for the United States in Opposition, *Ocanas* v. *United States*, *supra*, at 2, 4.

[4]In affirming the convictions in *Ocanas*, the court of appeals announced the "general rule" that "either party should be entitled to * * * withdraw its consent to the bargain until the plea is tendered and the bargain as it then exists is accepted by the court" (628 F.2d at 358). We do not agree with this general rule, and in our opposition to the petition for certiorari in *Ocanas* did not defend it. Given the factual context of *Ocanas* — in which the district court sanctioned the government's withdrawal from the plea agreement — there is no conflict that requires resolution by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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